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# The Enforceability of Consent-to-Assign Provisions in Texas Oil and Gas Leases

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# THE ENFORCEABILITY OF CONSENT-TO-ASSIGN PROVISIONS IN TEXAS OIL AND GAS LEASES

*T. Ray Guy & Jason E. Wright\**

## ABSTRACT

*Oil and gas leases are unique instruments that, on their face, appear to be contracts or traditional landlord-tenant leases. Indeed, landowners often desire to have them treated as such by including provisions giving a lessor power to limit or control any assignment of the lease. Typically, this takes the form of a consent-to-assign provision seen in many types of ordinary contracts and leases. In Texas, however, an oil gas lease actually conveys a fee simple property interest; and property law, far more than contract or landlord-tenant law, greatly disfavors any restraint that acts to restrict the free transferability (or “alienation”) of property rights. As such, an inherent tension may exist between a lessor who has a right to withhold consent to an assignment under the lease terms and a lessee who desires to transfer the drilling rights to others.*

*Nonetheless, Texas courts have rarely had occasion to pass on the enforceability of consent-to-assign provisions in the oil and gas leasing context, primarily because commercial parties generally are more apt to be reasonably and reach agreements when times are good. The prolonged downturn in oil prices, however, is likely to result in increased litigation in many areas. There is a potential, in particular, that lessors may seek to exploit the lack of developed case law in the consent-to-assign area by demanding “consent fees” or attempting to terminate leases if assigned without consent. This article thus analyzes the legal underpinnings in Texas to provide guidance to lessees faced with unreasonable demands or litigation risk and concludes that, in most situations, a consent-to-assign provision is not as enforceable as it may appear, while further suggesting practical ways in which to mitigate the risks of routine assignment.*

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\* The authors are attorneys in the Dallas office of Weil, Gotshal & Manges LLP, and would like to thank their colleague Rodney L. Moore for assistance in reviewing and improving this article.

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## I. INTRODUCTION

CONTRACT law and property law both serve several important goals in a free-market society. Perhaps the most evident aim of contract law is to provide assurance that promises will be enforced (through expectancy damages at the least). Property law seeks similar predictability but at the same time strives to promote a “better utilization of society’s wealth by . . . assisting in assets flowing to those who would put them to their best use.”<sup>1</sup> On occasion those objectives may conflict. This article explores the outcome of such a conflict in the context of Texas oil and gas leases that contain provisions that purport to give a landowner power to restrict the assignment of the leased rights to others.

The upstream oil and gas business achieves efficiency in large part based upon the ability to buy, sell, or otherwise transfer drilling rights obtained by lease, and in practice, it is routine for those rights to change hands several times before a single well is ever drilled. There are several practical reasons why that may occur: (i) the landman who first signs up a property owner may be a speculator with no intent of developing the rights; (ii) the circumstances for the original lessee may change such that it becomes unable to drill; or (iii) a producer may need to prioritize and redirect its resources to other assets. In general, then, the free transferability of oil and gas leases maximizes profit-making opportunities for both landowners and producers by naturally guiding drilling rights into the hands of those most likely to use them.

Nevertheless, some landowners seek to limit the assignability of a lease—most often to maintain control over who works on their land and to ensure the leasing counterparty is financially responsible enough to be held accountable for any problems that may arise (such as excessive surface damage or underpayment of royalties).<sup>2</sup> It would be unusual for a landowner to seek to prohibit assignment altogether—or for one to have the negotiating power to attain such a concession—yet it is fairly common for oil and gas leases in Texas to contain a clause requiring lessor consent prior to an assignment. Most often such consent right is coupled with the corresponding obligation that consent “shall not be unreasonably withheld,” but on occasion there are provisions that go further to declare that any assignment done without consent is void or that the entire lease terminates as a penalty. When parties fail to act rationally, such provisions can end up straddling the fault line between enforcing contractual promises and encouraging the most beneficial use of real property interests.

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1. *Procter v. Foxmeyer Drug Co.*, 884 S.W.2d 853, 862 (Tex. App.—Dallas 1994, no writ).

2. See Luke Meier & Rory Ryan, *The Validity of Restraints on Alienation in an Oil and Gas Lease*, 64 BUFF. L. REV. 305, 317 (2016) (describing what the authors termed a “partnership” between landowner and extractor).

Given the current downturn in oil markets and expectation that prices will remain far less than \$100 per barrel for the foreseeable future, it is conceivable that some lessors may seek to offset lower returns by way of litigation. Consent-to-assign provisions are one area subject to potential exploitation due to the lack of developed case law in Texas that addresses the enforceability (or unenforceability) of such clauses in an oil and gas leasing context. Lessors may attempt to use that uncertainty to demand excessive “consent fees” or free themselves entirely to sign new leases on better terms.<sup>3</sup> Past legal scholarship has touched on the enforceability of consent-to-assign provisions, but it focuses more on guidelines for drafting or has become dated given updates to the authoritative sources.<sup>4</sup> This article thus surveys the current state of the law in Texas to provide lessees with some guidance in managing the risks of routine assignment, which may occur in bulk during a merger, acquisition, or restructuring.

In short, although Texas courts have rarely addressed consent-to-assign provisions in the context of an oil and gas lease, all indications are that, except for limited types of forfeiture clauses that should be handled with caution, the contractual right to withhold consent to an assignment will most often yield to the objective of ensuring free alienability of property rights (or have such a trivial impact as to be effectively inconsequential). The following examines the legal underpinnings for that conclusion and applies the current legal guidance available to various types of language that may be found in a consent-to-assign provision, while further suggesting ways to mitigate the impact of a lessor acting unreasonably to prevent transfer.

## II. OIL AND GAS LEASES IN TEXAS ARE PRIMARILY FEE SIMPLE PROPERTY INTERESTS

A critical threshold step in evaluating any legal issue is to first determine the body of law that applies. Oil and gas leases have features that impact both contract and property law, each of which deal with restrictions on the ability to transfer rights in sometimes divergent ways.

Texas, as with most jurisdictions, favors the free transferability of con-

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3. Indeed, one case being petitioned for review by the Texas Supreme Court at the time of drafting—*Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*—involves a lessee who demanded \$5 million to give its consent to a driller’s assignment of their farmout agreement to another driller in what would have been a \$27.69 million transaction. 516 S.W.3d 89 (Tex. App.—Tyler 2017, pet. filed) (petition for review filed June 7, 2017, No. 17-0332).

4. See, e.g., Benjamin Robertson, Katy Pier Moore & Corey F. Wehmeyer, *Consent to Assignment Provisions in Texas Oil and Gas Leases: Drafting Solutions to Negotiation Impasse*, 48 TEX. TECH L. REV. 335 (2016); Terry I. Cross, *The Ties That Bind: Preemptive Rights and Restraints on Alienation that Commonly Burden Oil and Gas Properties*, 5 TEX. WESLEYAN L. REV. 193 (1999); David E. Pierce, *An Analytical Approach to Drafting Assignments*, 44 SW. L.J. 943 (1990); see also Meier & Ryan, *supra* note 2, at 308 (advocating for courts to enforce consent-to-assign provisions in oil and gas leases on a commercial transaction basis alone).

tract rights<sup>5</sup> while also allowing parties the freedom to agree otherwise (so long as their agreement is not contrary to public policy).<sup>6</sup> A basic tenet of property law as well is the power to “alienate” property.<sup>7</sup> A traditional lease of real property crosses over the two realms such that it results in a rather distinct body of law: landlord–tenant law. Traditionally, landlord–tenant law allows a number of restrictions to be placed on a lessee, and in fact, the statutory default in Texas is that landlord consent is required before surface property leased for commercial or residential purposes (such as an apartment or farming acreage) may be sublet to a third party.<sup>8</sup>

An oil and gas lease, however, is quite different from an ordinary rental arrangement. It necessarily involves interference with the surface land that still belongs to, and is often concurrently occupied and used by, the lessor, along with removal of physical property that exists below the surface (i.e., the minerals). That unique nature has resulted in differing viewpoints nationwide as to how to categorize an oil and gas lease. Several states view an oil and gas lease as granting no more than an exclusive right to profit on the minerals once they have been extracted from the ground (a “profit à prendre”),<sup>9</sup> others treat it as creating a fee simple

5. See *In re FH Partners, L.L.C.*, 335 S.W.3d 752, 761 (Tex. App.—Austin 2011, no pet.) (“Although the Agreement contains no terms that explicitly either authorize or prohibit assignment, the presumption or general rule under Texas law, as FH emphasizes, is that all contracts are freely assignable.”) (citing *Crim Truck & Tractor Co. v. Navistar Int’l Transp. Co.*, 823 S.W.2d 591, 596 (Tex. 1992) and *Dittman v. Model Baking Co.*, 271 S.W. 75, 77 (Tex. Comm’n App. 1925, judgm’t adopted)).

6. See *Pagosa Oil & Gas, L.L.C. v. Marrs & Smith P’ship*, 323 S.W.3d 203, 211 (Tex. App.—El Paso 2010, pet. denied) (stating that anti-assignment clause in a contract “[is] enforceable in Texas unless rendered ineffective by a statute”); see also *Sonny Arnold, Inc. v. Sentry Sav. Ass’n*, 633 S.W.2d 811, 815 (Tex. 1982) (noting parties have a “right to contract with regard to their property as they see fit, so long as the contract does not offend public policy and is not illegal”).

7. See *Carder v. McDermott*, 12 Tex. 546, 549 (1854) (“It will be admitted as a principle not to be questioned, that the power to alienate property is a necessary consequence of ownership, and is founded on natural right.”).

8. See TEX. PROP. CODE ANN. § 91.005 (West 2016).

9. See, e.g., *SEMO, Inc. v. Bd. of Comm’rs*, 993 So. 2d 222, 226 (La. App. 1st Cir. 2008) (“Under Louisiana law, the ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form. Rather, the landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.”); *State v. Pennzoil Co.*, 752 P.2d 975, 980 (Wyo. 1988) (“In Wyoming, the right created by an oil and gas lease is a profit à prendre, connoting the right ‘to search for oil and gas and if either is found, to remove it from the land.’”) (citations omitted); *Shearer v. United Carbon Co.*, 103 S.E.2d 883, 886 (W. Va. 1958) (“The interest which a lessee secures by an oil and gas lease under the later decisions of this Court is an inchoate and contingent interest. It creates in the lessee a vested right to produce the minerals pursuant to the terms of the lease after discovery thereof.”); *Gavina v. Smith*, 154 P.2d 681, 683 (Cal. 1944) (“It is settled in this state that an oil lease like the one in the present case creates a profit à prendre and vests in the lessee an estate in real property . . . and that the owner may not quiet his title against such a vested interest.”) (citations omitted); see also *In re Aurora Oil & Gas Corp.*, 439 B.R. 674, 678–79 (Bankr. W.D. Mich. 2010) (noting court persuaded “that Michigan treats a lessee’s interest as a leasehold or profit à prendre, but not a freehold estate.”); see RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 (2000) (“A profit à prendre is an ease-

property interest in the minerals themselves,<sup>10</sup> and a few regard such a lease as creating a hybrid in between those two main viewpoints.<sup>11</sup> Thus, landlord-tenant principles may or may not be significant depending on how the jurisdiction at issue characterizes the legal rights created by an oil and gas lease.<sup>12</sup>

In Texas, it is well established that an oil and gas lease is a “lease” in name only and that landlord-tenant law has no application. Despite the contractual form and name of the instrument, it actually conveys a fee simple determinable<sup>13</sup> interest in the minerals themselves. The Texas Supreme Court succinctly summarized that position in the 2003 case of *Natural Gas Pipeline Company of America v. Pool*:

[I]t has long been recognized that an oil and gas lease is not a “lease” in the traditional sense of a lease of the surface of real property. In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee. Consequently, the lessee/grantee acquires ownership of all the minerals in place that the lessor/grantor owned and purported to lease, subject to the possibility of reverter in the lessor/grantor. The lessee’s/grantee’s interest is “determinable” because it may terminate and revert entirely to the lessor/grantor upon the occurrence of events that

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ment that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another.”).

10. See, e.g., *Maralex Res., Inc. v. Chamberlain*, 320 P.3d 399, 403 (Colo. App. 2014) (“The Colorado Supreme Court has also recognized that ‘the majority rule in western states appears to favor interpretation of the lessee’s interest in the oil and gas lease as an interest in real estate.’ . . . Accordingly, as implicitly accepted in *Hagood*, we conclude that an oil and gas lessee has an interest in real property.”) (citations omitted); *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 267 (Pa. 2012) (“If development during the agreed upon primary term is unsuccessful, no estate vests in the lessee. If, however, oil or gas is produced, a fee simple determinable is created in the lessee, and the lessee’s right to extract the oil or gas becomes vested.”); *Jupiter Oil Co. v. Snow*, 819 S.W.2d 466, 468 (Tex. 1991) (“The common oil and gas lease is a fee simple determinable estate in the realty.”); *Shields v. Moffitt*, 683 P.2d 530, 532–33 (Okla. 1984) (“From the foregoing, we conclude that the holder of an oil and gas lease during the primary term or as extended by production has a base or qualified fee, i.e., an estate in real property having the nature of a fee, but not a fee simple absolute.”); *Rock Island Oil & Refining Co. v. Simmons*, 386 P.2d 239, 241 (N.M. 1963) (“It is well settled in New Mexico that an oil and gas lease conveys an interest in real estate.”); see also *Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626, 630 (N.M. 2003) (“The typical oil and gas lease grants the lessee a fee simple determinable interest in the subsurface minerals within a designated area.”).

11. See, e.g., *Ingram v. Ingram*, 521 P.2d 254, 258 (Kan. 1974) (“It is obvious from this analysis of the Kansas statutes and decisions that in this state an oil and gas lease is a hybrid property interest. For some purposes an oil and gas leasehold interest is considered to be personal property and for other purposes it is treated as real property.”).

12. See, e.g., *Harding v. Viking Int’l Res. Co., Inc.*, 1 N.E.3d 872, 875 (Ohio App. 2013) (construing Ohio law to view an oil and gas lease as simply a contract and, as such, voiding an assignment made without consent).

13. The event that makes the fee simple interest “determinable” is when the land stops producing oil and gas in paying quantities. See *Krabbe v. Anadarko Petroleum Corp.*, 46 S.W.3d 308, 315 (Tex. App.—Amarillo 2001, pet. denied) (“The language of a typical oil or gas lease is such that the lease may be kept alive after the primary term only by production in paying quantities or a savings clause, such as a shut-in royalty clause, continuous operations clause, drilling operations clause, etc.”).

the lease specifies will cause termination of the estate.<sup>14</sup>

Moreover, an oil and gas lease creates a fee simple determinable in Texas regardless of the granting terms used or contrary efforts of the parties.<sup>15</sup>

As a result, an oil and gas lease of Texas land that is silent regarding assignability is freely transferable according to the general rule that all real property interests (and contract rights) are assignable.<sup>16</sup> If the parties agree otherwise by including terms in the lease placing restrictions on assignment, then standard contract interpretation rules apply to construe the language in the context of the common law governing conveyances of estates in fee simple,<sup>17</sup> which may result in some surprising outcomes.

### III. A LIMITATION ON THE ABILITY TO ASSIGN AN OIL AND GAS LEASE IN TEXAS IS A RESTRAINT AGAINST ALIENATION

It has long been true in Texas that any limitations placed on a person's right to sell or dispose of real property interests granted in fee simple terms are "restraints upon alienation" that are greatly disfavored as a

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14. 124 S.W.3d 188, 192 (Tex. 2003).

15. *See* *Stephens County v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290, 294 (Tex. 1923) ("Notwithstanding the distinctions attempted to be drawn in the decisions, we cannot conclude otherwise than that there is no real difference in the title conveyed, whether an instrument takes the form of a grant of the exclusive right to mine and appropriate all of a certain mineral (as in *Benevides v. Hunt*, supra), or takes the form of a demise of the land, for the sole purpose of mining operations, coupled with a grant of the exclusive right to produce and dispose of the mineral (as in this case), or takes the form of a grant of the mineral with the exclusive right to mine for, produce, and dispose thereof (as in *Texas Co. v. Daugherty*, supra). The results are substantially the same to all parties at interest, whether the one or other form of instrument be used. Why hold that instruments in different forms create different estates, where there is no difference in fact with respect to that of which each divests the grantor, his heirs or assigns, nor with respect to that with which each invests the grantee, his heirs or assigns?").

16. *See, e.g.*, *Phillips v. Oil, Inc.*, 104 S.W.2d 576, 579 (Tex. Civ. App.—Eastland 1937, writ ref'd) ("There is nothing in either of said four [oil and gas leases] prohibiting its assignment. Under such situation, there is nothing to prevent the application of the general rule and the Texas statute providing for the assignability of all written contracts . . ."); *Watts v. England*, 269 S.W. 585, 587–88 (Ark. 1925) ("The lease in question contained no covenant against assigning it, and could therefore be assigned to J. E. England, Jr., trustee."); 4 EUGENE KUNTZ, *A TREATISE ON THE LAW OF OIL AND GAS* § 51.2(a) (1990) ("There is no reason to doubt that the lessee may freely assign the lease, in whole or in part, with or without such a clause [allowing assignment].").

17. Although an oil and gas lease is not a fee simple absolute since it will eventually terminate (making it a fee simple determinable), the First Restatement directs that "defeasible" estates should be analyzed under the same rules applicable to "indefeasible" estates if they are otherwise "readily marketable." *RESTATEMENT (FIRST) OF PROP.* § 407 cmt. b (1944). In general, oil and gas interests are so highly marketable that they would likely be treated the same as a fee simple absolute in any suit implicating a consent-to-assign provision.



matter of public policy.<sup>18, 19</sup> Due to the strong bias against such restraints, any conveyance of property rights—including those in an oil and gas lease—that purport to restrict the ability to transfer the rights to others is “strictly construed.”<sup>20</sup> That means the language is interpreted according to its precise, literal meaning. For example, a provision restricting the *assignment* of a lease is unlikely to be construed so as to prevent other dispositions, such as a *sublease* of less than the entire interest.<sup>21</sup> No court

18. See *Robbins v. HNG Oil Co.*, 878 S.W.2d 351, 363 (Tex. App.—Beaumont 1994, writ dismissed w.o.j.) (“But it is Hornbook law and an axiomatic rule that restraints on alienation are squarely contrary to public policy and are forbidden and disallowed.”); see also *O’Connor v. Thetford*, 174 S.W. 680, 681 (Tex. Civ. App.—San Antonio 1915, writ refused) (“The tying up of property was regarded by the common law as an evil, and in order to prevent it two doctrines were established, one that all interests should be alienable, the other that all interests must arise within certain limits, the latter being known as the rule against perpetuities. In this case we are concerned only with the first doctrine, and the extent to which it exists in this state under the common law which has furnished our rules for construing deeds since its adoption in 1840. It is well settled that a general restraint upon the power of alienation when incorporated in a deed or will otherwise conveying a fee-simple title is void . . . .”); *Hicks v. Castille*, 313 S.W.3d 874, 882 (Tex. App.—Amarillo 2010, pet. denied) (“The right of alienation is an inherent and inseparable quality of an estate in fee simple.”) (citing *Potter v. Couch*, 141 U.S. 296, 315 (1890) (“A restriction . . . not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation.”)); *Griffin v. Griffin*, No. 10-08-00327-CV, 2010 WL 140383, at \*4 (Tex. App.—Waco Jan. 13, 2010, pet. denied) (mem. op.) (noting the principle is considered “well-settled in this state prior to 1909”) (citing *Diamond v. Rotan*, 124 S.W. 196, 198 (Tex. Civ. App.—Texarkana 1909, writ refused) (“That a general restraint upon the power of alienation, when incorporated in a deed or will otherwise conveying a fee-simple right to the property is void, is now too well settled to require discussion.”)).

19. The Dallas Court of Appeals in *Procter v. Foxmeyer Drug Company* identified the public policy prohibiting restraints on alienation as serving at least three purposes:

1. Balanc[ing] the current property owner’s desire to prolong control over his property and a latter owner’s desire to be free from the “dead” hand;
2. Contribut[ing] to better utilization of society’s wealth by reducing fear from uncertain investments and assisting in assets flowing to those who would put them to their best use; and
3. Keep[ing] the property available to satisfy the current exigencies of the owner and, thus, stimulate the competitive theory basis of the economy.

884 S.W.2d 853, 862 (Tex. App.—Dallas 1994, no writ).

20. See *Knight v. Chicago Corp.*, 188 S.W.2d 564, 566 (Tex. 1945) (addressing oil and gas lease, stating: “Since the petitioners are seeking to recover for a claimed violation of a restriction against alienation, they must bring the act of their lessee strictly within the language of the restriction.”); see also *Clayton Williams Energy, Inc. v. BMT O & G TX, L.P.*, 473 S.W.3d 341, 350 (Tex. App.—El Paso 2015, pet. denied) (strictly applying plain language of assignment clause notwithstanding the claim that it would cause “absurd result[s]”); *Crestview, Ltd. v. Foremost Ins. Co.*, 621 S.W.2d 816, 826 (Tex. Civ. App.—Austin 1981, writ refused n.r.e.) (noting courts are instructed to “prefer a construction of a possible restraint so that there is no such result”).

21. See, e.g., *Amco Trust, Inc. v. Naylor*, 317 S.W.2d 47, 50 (Tex. 1958) (“In order to constitute an assignment, the lessee must part with his entire interest in all or part of the demised premises without retaining any reversionary interest.”); *718 Assocs., Ltd. v. Sun-west N.O.P., Inc.*, 1 S.W.3d 355, 360 (Tex. App.—Waco 1999, pet. denied) (discussing various differences and effects between assignment and sublease); see also *Jackson v. Sims*, 201 F.2d 259, 262 (10th Cir. 1953) (finding prohibition against assignment of mineral lease on Native American land in Oklahoma did not apply to sublease, stating: “The law generally recognizes a distinction between an assignment and a sublease. Oklahoma follows the general rule to the effect that a conveyance which does not pass the whole interest of the

in Texas appears to have specifically addressed the assignment–sublease distinction for purposes of a consent-to-assign provision in an oil and gas lease, but there are cases that use analogous reasoning to rule that an anti-assignment clause in no way limits a lessee’s ability to assign a *cause of action* related to the lease, as those are distinct matters.<sup>22</sup> Further, in “strictly construing” lease language, at least one Texas court has invalidated a provision prohibiting a lessee from making an “offer” or an “attempt” to assign an oil and gas lease because of the lack of certainty that exists in trying to determine all the instances when a person may offer or attempt to do something.<sup>23</sup> This indicates the bias against such restraints is, indeed, very heavy in Texas.

Even if a limitation on assignment is clearly stated and directly applicable, the preference to avoid a restriction on alienability requires that a restraint be enforced *only* to the extent it is “reasonable.”<sup>24</sup> For guidance in determining whether particular language constitutes an unreasonable restraint, courts in Texas have consistently turned to the legal principles summarized by the Restatements of Property.<sup>25</sup>

The Restatement (First) of Property (the “First Restatement”) identifies three categories of restraints against alienation—promissory restraints, disabling restraints, and forfeiture restraints<sup>26</sup>—each of which are discussed in more detail in the following sections. In general, however, disabling restraints are always invalid as a matter of law,<sup>27</sup> and the other two are enforceable if limited in specific ways to protect important interests of the conveying party.

#### A. PROMISSORY RESTRAINTS

Section 404(1)(b) of the First Restatement defines a promissory restraint as an attempt to “cause a later conveyance . . . to impose contrac-

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lessee for the full term, but retains some sort of reversionary interest, is a sublease and not an assignment.”).

22. *See* *Pagosa Oil & Gas, L.L.C. v. Marrs & Smith P’ship*, 323 S.W.3d 203, 211–12 (Tex. App.—El Paso 2010, pet. denied) (“Texas law recognizes a distinction between a contracting party’s ability to assign rights under a contract containing an anti-assignment provision, and that same party’s ability to assign a cause of action arising from breach of that contract.”) (citing cases in support).

23. *Knight v. Chicago Corp.*, 183 S.W.2d 666, 671 (Tex. Civ. App.—San Antonio 1944), *aff’d*, 188 S.W.2d 564 (Tex. 1945) (“Conditions against alienation are strictly construed, and even if they would otherwise be valid are ineffectual unless certainly and clearly expressed. A provision restraining the grantee from ‘offering’ or ‘attempting’ to alien[ate] is ordinarily void for uncertainty and cannot be restrained.”).

24. *See* *Sonny Arnold, Inc. v. Sentry Sav. Ass’n*, 633 S.W.2d 811, 819 (Tex. 1982) (Spears, J., concurring) (“The mere fact that a contractual provision may restrain the alienation of property does not mean that the provision is per se invalid. It is only unreasonable restraints upon alienation which are not enforced.”).

25. *See id.* at 813 (majority opinion); *see also* *Navasota Res., L.P. v. First Source Texas, Inc.*, 249 S.W.3d 526, 537 (Tex. App.—Waco 2008, pet. denied) (noting Texas courts look to Restatements and citing cases).

26. RESTATEMENT (FIRST) OF PROP. §§ 404, 407 (1944).

27. *Mattern v. Herzog*, 367 S.W.2d 312, 319 (Tex. 1963) (noting rule that disabling restraints are invalid); *see also* *Deviney v. NationsBank*, 993 S.W.2d 443, 449 (Tex. App.—Waco 1999, pet. denied) (same).

tual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey.”<sup>28</sup> The comments to Section 404 include specific examples and note that such liability results “not only when the promise not to convey is unqualified but also when it is qualified by permitting alienation with consent and the consent is not obtained.”<sup>29</sup> As a result, most basic consent-to-assign provisions in an oil and gas lease will be promissory restraints, unless they contain additional language that makes them fall into one of the other two categories (disabling restraints or forfeiture restraints) that are discussed in the sections further below.

Under Section 406 of the First Restatement, a promissory restraint is valid when it is: (i) “qualified so as to permit alienation to some though not all possible alienees” and (ii) “reasonable under the circumstances.”<sup>30</sup> An unqualified prohibition against all assignment plainly does not satisfy the first element and, as such, would likely be viewed by a Texas court as unenforceable no matter the motive for the restriction or how reasonable a lessor’s concerns may have been at the time of granting.<sup>31</sup> This is true regardless of the fact that contract law would otherwise allow parties to agree to prohibit all transfers without qualification because, in a real property context, it simply violates public policy to so severely hamper alienation.<sup>32</sup>

Therefore, language stating that a real property interest “shall not be assigned” at all would likely be viewed by a Texas court as invalid as a matter of law.

On the other hand, a restriction limiting assignment to those for whom the consent of another has been obtained (typically, the lessor) is likely “qualified” in a way that would satisfy the first element of Section 406.<sup>33</sup>

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28. RESTATEMENT (FIRST) OF PROP. § 404(1)(b).

29. *Id.* § 404 cmt. g.

30. *Id.* § 406(b)–(c).

31. *Id.* § 406 cmt. d (“An unqualified restraint on what is or otherwise would be a legal possessory indefeasible estate in fee simple is an attempt to prevent perpetually the alienation of the estate in fee simple to all persons and by all available methods . . . . The objectives which one imposing such an extensive restraint on alienation could have in mind are never regarded as sufficiently meritorious to outweigh the evils which such interference with the power of alienation would cause.”).

32. See *N. Point Patio Offices Venture v. United Ben. Life Ins. Co.*, 672 S.W.2d 35, 38 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.) (“No one suggests any social or economic value of the provision here in question except that of the parties being able to contract as they see fit. This is admittedly an important right, but its unfettered application under these circumstances would effectively destroy the rule prohibiting unreasonable restraints on alienation of property.”); *Crestview, Ltd. v. Foremost Ins. Co.*, 621 S.W.2d 816, 823 (Tex. Civ. App.—Austin 1981, writ ref’d n.r.e.) (“The matter of whether the clause is an unreasonable restraint on alienation involves not the intention of the parties to a contract, or their justifiable expectations thereunder, but the ascertainment and implementation of the broad public policies which justify the common-law rule that prohibits such restraints.”).

33. See, e.g., *Crestview*, 621 S.W.2d at 826–27 (“If the clause in issue did constitute a restraint on alienation, we would nevertheless be required to enforce it in this case because it is expressly qualified by the requirement of reasonable conduct on the part of the noteholder, which implies that alienation is permitted to some though not all possible alien-

The validity of such a provision would then depend on whether it meets the second requirement, i.e., that the restriction be “reasonable under the circumstances.” In making that determination, the First Restatement offers a number of nonexclusive factors for a court to consider as to what is both reasonable and unreasonable, all of which are listed in the footnote below.<sup>34</sup> Unfortunately, many of the factors on both sides of the ledger could easily go either way in a typical oil and gas leasing scenario, such that the factors themselves are largely not helpful to a court analyzing the issue. In the absence of developed case law, the First Restatement factors by themselves provide little guidance.

Fortunately, more clarity may be gained from newer editions and supplements to the Restatement. The Restatement (Third) of Property: Servitudes (the “Third Restatement”) in particular—published in 2000—provides pertinent factors to consider in determining what constitutes a reasonable restraint.<sup>35</sup> Section 3.4 of the Third Restatement states that a

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ees.”). *But see* Williams v. Williams, 73 S.W.3d 376, 380 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (finding a restriction in a will that property not be sold without consent of other grantees void as a “general restraint on the power of alienation”); Deviney v. NationsBank, 993 S.W.2d 443, 451 (Tex. App.—Waco 1999, pet. denied) (“The second sentence of the devise prohibits Nolan Taylor’s daughters from conveying their interests in the Farm without the consent of the co-owners. This constitutes an invalid disabling restraint on the alienation of their interests. . . . Accordingly, it is void.”).

34. “*The following factors, when found to be present, tend to support the conclusion that the restraint is reasonable:* the one imposing the restraint has some interest in land which he is seeking to protect by the enforcement of the restraint; the restraint is limited in duration; the enforcement of the restraint accomplishes a worthwhile purpose; the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained; the number of persons to whom alienation is prohibited is small . . . ; the one upon whom the restraint is imposed is a charity. *The following factors, when found to be present, tend to support the conclusion that the restraint is unreasonable:* the restraint is capricious; the restraint is imposed for spite or malice; the one imposing the restraint has no interest in land that is benefited by the enforcement of the restraint; the restraint is unlimited in duration; the number of persons to whom alienation is prohibited is large . . . . The factors listed above as tending to support a conclusion that the restraint is reasonable and those listed as tending to the opposite conclusion are not exhaustive. Each case must be thoroughly examined in the light of all the circumstances to determine whether the objective sought to be accomplished by the restraint is worth attaining at the cost of interfering with the freedom of alienation or to determine whether the particular interference with alienability is so slight as not to be material.” RESTATEMENT (FIRST) OF PROP. § 406 cmt. i (1944) (emphasis added).

35. The Third Restatement has been applied by at least one Texas court in an oil and gas case (involving preferential rights) and, thus, would likely be used to assess the validity of a promissory restraint in a consent-to-assign provision. *See* Navasota Res., L.P. v. First Source Texas, Inc., 249 S.W.3d 526, 538 (Tex. App.—Waco 2008, pet. denied) (citing both First and Third Restatements in addressing joint operating agreement). There may be arguments that *Navasota* should not have used the Third Restatement since an introductory section states that “covenants in leases” are not addressed to “the extent that special rules and considerations apply” to such servitudes, *see* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1(2)(a) (2000), and comment e explains further that “[l]andlord-tenant law, real-property security law, oil and gas law, timber law, and the law governing extraction of other minerals” are specialized areas that the Third Restatement was not intended to cover. *Id.* at cmt. e (emphasis added). However, given the set of topics in which the qualification appears, the statement seems to be directed towards those jurisdictions which characterize an oil and gas lease as something other than a fee simple interest. As a result, there is a significant likelihood that a court in Texas assessing a consent provision in an oil and gas lease would rely on the Third Restatement for guidance.

prohibition against transferring a property interest without the consent of another is valid only if it is reasonable as determined by “weighing the utility of the restraint against the injurious consequences of enforcing the restraint.”<sup>36</sup> The comments go on to elaborate that a consent requirement is *presumptively* unreasonable “unless there is strong justification for the prohibition, and, unless the consent can be withheld only for reasons directly related to the justification for the restraint.”<sup>37</sup> Importantly, the comments note further that if the language allows consent to be withheld “arbitrarily,” then the restriction can be reasonable “only if the person withholding consent is obligated to supply a substitute purchaser for the property.”<sup>38</sup> Very few (if any) consent-to-assign provisions include an obligation for the lessor to find a substitute purchaser. As such, a provision in an oil and gas lease stating that an assignment may not be done without lessor consent—without further spelling out that the consent shall not be unreasonably withheld—would be presumptively invalid under Section 3.4 of the Third Restatement.<sup>39</sup>

Assuming a consent-to-assign provision in the form of a promissory restraint is qualified such that consent may not be unreasonably withheld, Section 3.4 would then require “weighing” the utility of the consent requirement against its injurious consequences to determine if the provision can be enforced.<sup>40</sup> The most obvious and relevant “justification” for a consent requirement in an oil and gas lease is to protect the owner of the surface estate from having to deal with a lessee that has insufficient assets against which to recover should there be excessive surface damage or other disputes. However, the potential injurious consequences are numerous—including, as identified by the Third Restatement: (i) “impediments to the operation of a free market in land;” (ii) “limiting the prospects for improvement, development, and redevelopment” of the land; (iii) “demoralization costs associated with subordinating the desires of current landowners to the desires of past owners;” (iv) “frustrating the expectations that normally flow from land ownership;” and (v) placing one party “in a position to take unfair advantage of another’s need or desire to transfer property.”<sup>41</sup> This litany of injurious consequences

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36. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4; *see also id.* at cmt. b (stating that “prohibitions on transfer without the consent of another” fall within requirements of Section 3.4 of the Third Restatement).

37. *Id.* § 3.4 cmt. d.

38. *Id.*

39. A recent decision from the Tyler Court of Appeals reached the opposite conclusion regarding a consent-to-assign provision in a farmout agreement. *See Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co.*, 516 S.W.3d 89, 96–97 (Tex. App.—Tyler 2017, pet. filed). However, a farmout agreement often deals only with the provision of services such that contract law alone may apply. To the extent the farmout agreement in *Carrizo* involved a transfer of real property interests (if any), it does not appear that the parties briefed the impact of property law, nor did the court of appeals address any principles of property law. *See generally id.* At the time of drafting, however, the *Carrizo* case was being petitioned for review by the Texas Supreme Court. *See supra* note 3.

40. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4.

41. *Id.* § 3.4 cmt. c.

weighs against the likelihood that a promissory restraint in the form of a consent-to-assign provision in a Texas oil and gas lease would be reasonable in all but the most lopsided circumstances (e.g., when the contemplated transferee is clearly disreputable, reckless, or a thinly-capitalized shell entity).<sup>42</sup>

The last injurious consequence identified above—placing one party in a position to take unfair advantage of another’s need or desire to transfer the property interest—is probably the most significant as it is that most likely to occur on a routine basis. Counterparties in many settings have not hesitated to use consent provisions to extract fees or concessions that were never part of the original bargain. In many jurisdictions, such coercion is constrained by the inherent duty of good faith and fair dealing.<sup>43</sup> But no such general duty of good faith and fair dealing exists in Texas.<sup>44</sup> Nevertheless, the fact that an oil and gas lease in Texas is a real property interest brings into play the Third Restatement’s requirement that, when consent is withheld, it be done only “for reasons directly related to the justification for the restraint.”<sup>45</sup> A lessor who withholds consent for the purpose of extracting additional financial gain or other unbargained-for concessions—even when dealing with an original lessee—may, by such coercive efforts alone, place itself squarely within the Third Restatement’s presumption of unreasonableness and thereby negate any possibility of having the consent right enforced for legitimate reasons.<sup>46</sup>

Even if a Texas court were to find a basic consent-to-assign provision to be a reasonable restriction and determine the landowner had a legitimate basis upon which to object to a particular assignee (doing so without exploitation of the consent right), there may still be no effective restriction against assignment because, as a promissory restraint (i.e., a covenant), violation of the consent right would give rise only to a cause of action for damages. Absent a liquidated damages clause,<sup>47</sup> proving any harm resulted from the mere fact of an assignment would typically be difficult

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42. See, e.g., *Carrizo*, 516 S.W.3d at 94, 100 (noting an expert witness in that case, Professor Bruce Kramer, testified the custom in the oil and gas industry is that “consent could not be withheld absent a reasonable concern about the potential assignee’s capabilities” and further, in the concurrence, noting Mr. Kramer stated the practice is for consent to be given absent “a concern regarding the financial status, technical expertise, or general reputation of the proposed assignee.”).

43. See, e.g., *Dalton v. Educ. Testing Serv.*, 663 N.E.2d 289, 291 (N.Y. 1995) (“Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion.”); see also RESTATEMENT (FIRST) OF CONTRACTS § 151(c) (1932); 69 AM. JUR. PROOF OF FACTS 3d 191 § 12 (2002).

44. See *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225 (Tex. 2002) (duty of good faith and fair dealing not recognized except for when contract creates or governs special relationship between parties).

45. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. d.

46. See, e.g., *N. Point Patio Offices Venture v. United Ben. Life Ins. Co.*, 672 S.W.2d 35, 38 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.) (“Because there was no specific provision for such a ‘waiver’ fee, its imposition by the lender was coercive and by its nature a restraint on alienation of the property.”).

47. See *Trafalgar House Oil & Gas Inc. v. De Hinojosa*, 773 S.W.2d 797, 799 (Tex. App.—San Antonio 1989, no writ) (\$1000 liquidated damages in event of failing to give notice of assignment was valid and enforceable).

because there is nothing inherently damaging by a simple change in the identity of the lessee. The First Restatement thus highlights that a promissory restraint is, in practice, often one in form alone:

The fact that a promissory restraint is held valid does not mean that all conceivable contractual remedies are available to the person entitled to enforce the restraint. Sometimes the only available remedy may be one for damages, and that even may be only a remedy for nominal damages. If this is true, of course, the promissory restraint does not operate as a significant impediment to the alienation of the property.<sup>48</sup>

The few Texas courts addressing the violation of a promissory consent-to-assign provision in a real property context have tended to conclude just that: there is no resulting harm.

For example, in *Palmer v. Liles*, a 1984 case involving a contract that apportioned oil and gas mineral interests between co-owners and required consent prior to assignment, the First District Court of Appeals in Houston emphasized that “breach of a provision preventing assignment without consent of the original party will support an action for damages *when the party has suffered damages as a result of the breach*,”<sup>49</sup> and the appellate court affirmed the trial court’s ruling that no damages were suffered by the mere fact that the consent requirement had been violated. Similarly, in *Haskins v. First City National Bank of Lufkin* (decided in 1985), the Beaumont Court of Appeals addressed a land conveyance made by appellant (Haskins) to her son that reserved a life estate and prohibited any sale of the son’s interest without Haskins’ approval.<sup>50</sup> The son defaulted on loans secured against his remainder and the bank foreclosed. Haskins brought suit against both her son and the bank seeking to have the original conveyance set aside for violation of the consent requirement. The court ruled that, because the consent provision did not provide Haskins with a right of reentry for its violation, it was a covenant and she thus had, at best, a cause of action for breach of contract against her son.<sup>51</sup> Yet, since Haskins’ life estate had not been disturbed (she remained living on the property while the bank held the remainder), there were no recoverable damages.

As a result, it appears that a promissory restraint in a Texas oil and gas lease providing that no assignment may occur without lessor consent is, in effect, not much of a prohibition on assignment at all. It would most likely subject the assignor to damages, which in many instances would be nonexistent with a simple change in identity of the lessee.

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48. RESTATEMENT (FIRST) OF PROP. § 404 cmt. g (1944).

49. 677 S.W.2d 661, 665 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.) (emphasis in original).

50. 698 S.W.2d 754, 755 (Tex. App.—Beaumont 1985, no writ).

51. *Id.* at 756.

## B. DISABLING RESTRAINTS

Among the three types of restraints against alienation, those labeled as disabling restraints are perhaps the easiest to analyze since they are deemed invalid in virtually all circumstances. A disabling restraint is defined in the First Restatement as an attempt to “cause a later conveyance . . . to be void.”<sup>52</sup> The term “void” is further defined to include any provision that seeks to make a conveyance “have none of the legal consequences intended.”<sup>53</sup>

Under Section 405 of the First Restatement, all disabling restraints (except those “imposed on equitable interests under a trust”) are outright deemed invalid. The comments explain that the reason is due to an inherent form of estoppel:

All restraints on alienation run counter to the policy of freedom of alienation so that to be upheld they must in some way be justified. But disabling restraints have an additional objection to their validity since to be effective they *must enable the person restrained to deny the validity of his own conveyance* and also, unless the restraint is only as to voluntary conveyances, to deny his creditors resort to the property interests which he is enjoying. The result is the rule stated in this Section.<sup>54</sup>

The few Texas courts addressing consent provisions that purport to automatically void an assignment have reached the same conclusion as the First Restatement: that the attempted nullification was invalid as a matter of law because the lessee who made the assignment was estopped from denying the assignment and the grantor itself had no reversionary interest allowing it to reenter and enforce a penalty.<sup>55</sup>

As a result, a consent-to-assign provision in a Texas oil and gas lease that purports to automatically void any assignment would likely be ruled invalid as a matter of law.

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52. RESTATEMENT (FIRST) OF PROP. § 404(1)(a).

53. *Id.* § 404 cmt. f.

54. *Id.* § 405 cmt. a (emphasis added).

55. See, e.g., *Bouldin v. Miller*, 28 S.W. 940, 942 (Tex. 1894) (“Then, since this unlimited power of alienation is a necessary incident to such estate, and since there is no person who can enforce the attempted limitation on the power to sell when there is no condition, it follows that the words of limitation in the deed above are ineffectual in law, and the deed must be construed as if they had not been written therein.”); see also *Williams v. Williams*, 73 S.W.3d 376, 380 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (finding provision in will and partition deed preventing siblings from conveying their portions of devise without the consent of other siblings to be unenforceable and denying siblings’ request to void assignment to a third party); *Deviney v. NationsBank*, 993 S.W.2d 443, 451 (Tex. App.—Waco 1999, pet. denied) (“The second sentence of the devise prohibits Nolan Taylor’s daughters from conveying their interests in the Farm without the consent of the co-owners. This constitutes an invalid disabling restraint on the alienation of their interests. . . . Accordingly, it is void.”).



## C. FORFEITURE RESTRAINTS

Forfeitures are not favored by Texas law.<sup>56</sup> Nonetheless, a consent-to-assign provision drafted in a way so as to constitute a forfeiture restraint should be carefully analyzed because it could result in a loss of rights if worded correctly.

The First Restatement defines a forfeiture restraint as any attempt to “cause a later conveyance . . . to terminate or subject to termination all or a part of the property interest conveyed.”<sup>57</sup> Such restraints are subject to the same rules as promissory restraints—i.e., they must be qualified so as to permit alienation to “some though not all possible alienees” and be “reasonable under the circumstances”—with the additional condition that the rule against perpetuities must be satisfied.<sup>58</sup>

The Restatement (Second) of Property: Donative Transfers (the “Second Restatement”) addresses forfeiture restraints in detail.<sup>59</sup> In Section 4.2(3) of the Second Restatement, it is stated that a forfeiture restraint imposed on an interest in property is “valid if, and only if, under all the circumstances of the case, the restraint is found to be reasonable.” The provision goes on to list factors commonly supporting a finding that a forfeiture is reasonable:

- (a) The restraint is limited in duration;
- (b) The restraint is limited to allow a substantial variety of types of transfers to be employed;
- (c) The restraint is limited as to the number of persons to whom transfer is prohibited;
- (d) The restraint is such that it tends to increase the value of the property involved;

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56. See, e.g., *Decker v. Kirlicks*, 216 S.W. 385, 386 (Tex. 1919) (“Forfeitures are harsh and punitive in their operation. They are not favored by the law, and ought not to be. The authority to forfeit a vested right or estate should not rest in provisions whose meaning is uncertain and obscure. It should be found only in language which is plain and clear, whose unequivocal character may render its exercise fair and rightful.”); see also *Knight v. Chicago Corp.*, 183 S.W.2d 666, 671 (Tex. Civ. App.—San Antonio 1944), *aff’d*, 188 S.W.2d 564 (Tex. 1945) (“The law looks with disfavor upon forfeiture provisions.”).

57. RESTATEMENT (FIRST) OF PROP. § 404(1)(c).

58. See *id.* § 406; see also RESTATEMENT (SECOND) OF PROP. DONATIVE TRANSFERS § 4.2(3) (1983) (“A forfeiture restraint imposed on an interest in property . . . is valid if, and only if, under all the circumstances of the case, the restraint is found to be reasonable.”).

59. It should be noted that a restraint is more likely to be found “reasonable” in the context of a commercial transaction than a donative transaction. This is because a contracting party voluntarily accepts the restraint whereas, in a donative transfer, the donor unilaterally imposes the restraint. See *Procter v. Foxmeyer Drug Co.*, 884 S.W.2d 853, 858 (Tex. App.—Dallas 1994, no writ) (finding provisions in Second Restatement focused on donative transfers can conclusively determine the validity—but not the invalidity—of restraints in commercial transactions); see also *Meier & Ryan*, *supra* note 2, at 320–39. However, while the Second Restatement is primarily focused on donative transfers, Section 4.2(3) specifically notes it applies to *any* forfeiture restraint not governed by the other subsections therein (which more specifically apply to donative transfers). In any case, the considerations are very similar to those in Section 406 (cmt. i) of the First Restatement and Section 3.4 of the Third Restatement, which would otherwise apply to determine whether a restraint is “reasonable.”

- (e) The restraint is imposed upon an interest that is not otherwise readily marketable; or
- (f) The restraint is imposed upon property that is not readily marketable.<sup>60</sup>

Virtually all the factors listed above would weigh against a forfeiture restraint being found reasonable in the context of an oil and gas lease; particularly since the interests being restrained—i.e., drilling rights—are highly marketable and since most consent-to-assign provisions are not limited to specific persons or companies. Failing to draft a forfeiture restraint so as to exclude those to whom a transfer is most likely to occur (other drilling companies in this instance) thus would appear to make it unenforceable under the Second Restatement.<sup>61</sup>

There is only one case in Texas that addresses a forfeiture restraint in the context of an oil and gas lease, but there was no application of the rules discussed above because the language of the lease was strictly construed in a way so as to not restrict the assignment (not to mention the Second Restatement did not exist at the time). *Knight v. Chicago Corporation* is a 1944 case in which the San Antonio Court of Civil Appeals considered a lease that stated no assignment could be done without written consent of the lessor and that, further, any “attempt to assign” a portion of the lease would cause it to “ipso facto terminate as to the interest so assigned, as well as all of the remaining interest” owned by the lessee.<sup>62</sup> After the lease was pooled without consent, the lessor brought suit seeking a declaration that forfeiture had occurred. The court of civil appeals affirmed the trial court’s denial of the requested declaration. Strictly construing the language, the court of appeals ruled that the lease did not specifically prohibit unitization and, furthermore, that language barring an “offer[ ]” or “attempt[ ]” to assign was void for lack of certainty<sup>63</sup> because it is near impossible to determine when one begins to “attempt” an assignment. The Texas Supreme Court affirmed on slightly different grounds. After first confirming that the language of a restriction against alienability must be strictly construed,<sup>64</sup> the Supreme Court read the exclusionary language as actually permitting the unitization agreement at issue.<sup>65</sup>

Likewise, in *Outlaw v. Bowen*, a 1955 case involving joint owners of a mineral deed (not an oil and gas lease), the Amarillo Court of Civil Appeals refused to enforce a provision that stated no conveyance or assignment of the interest could be made “except in whole and that any attempt to convey or assign any portion less than the whole thereof . . . shall operate to forfeit the entire royalty hereby conveyed to the grantor

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60. RESTATEMENT (SECOND) OF PROP. DONATIVE TRANSFERS § 4.2(3).

61. See *id.* § 4.2 ill. 4 & cmt. r.

62. 183 S.W.2d 666, 668 (Tex. Civ. App.—San Antonio 1944), *aff’d*, 188 S.W.2d 564 (Tex. 1945).

63. *Id.* at 671.

64. *Knight v. Chicago Corp.*, 188 S.W.2d 564, 566 (Tex. 1945).

65. *Id.* at 567–68.

herein, and any such conveyance or a portion thereof shall be null and void.”<sup>66</sup> The court ruled the restriction invalid because the language did not provide for an enforceable penalty<sup>67</sup> while also citing to *Bouldin v. Miller* and *Knight v. Chicago Corporation*. Those citations indicate the court’s conclusion could have been based on either: (i) the fact that there was no stated reversion of the mineral rights to the grantor or anyone else (i.e., what was lacking in *Bouldin*)<sup>68, 69</sup> or (ii) the forfeiture was supposedly triggered by an “attempt” to assign (i.e., what was ruled invalid in *Knight*).<sup>70</sup> Either way, *Outlaw* further demonstrates that Texas courts are loath to approve of a forfeiture provision even in a non-donative commercial transfer.

A consent requirement that contains language of forfeiture should nonetheless be closely evaluated because, unlike a promissory restraint giving rise to damages, the consequences of ignoring such a provision could be a loss of the entire lease. Indeed, the Texas Supreme Court’s opinion in *Knight v. Chicago Corporation* noted that exact possibility, stating:

If the parties to the lease bound themselves by language which can be given no other reasonable construction than one which works such result [i.e., a forfeiture], it is the court’s duty to give effect thereto by declaring a termination, but if there is any uncertainty in the language so as to make it ambiguous or of doubtful meaning, relief should be denied them.<sup>71</sup>

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66. 285 S.W.2d 280, 283 (Tex. Civ. App.—Amarillo 1955, writ ref’d n.r.e.).

67. *Id.*

68. See *Bouldin v. Miller*, 28 S.W. 940, 941–42 (Tex. 1894) (“Livery of seisin being necessary to the creation of such estate, it could at common law be defeated only by corresponding notoriety of re-entry. If, as above shown, the conveyance is good at all events against the grantor therein, and good as to the original grantor until re-entry for condition broken, even when there is a condition against alienation, then it results that the conveyance would be valid as to both of said grantors when there is no condition annexed to said estate. The first grantor could not complain because there would be no condition broken, and therefore no right of reentry in him; and the second grantor could not complain because he would be estopped by his own conveyance. Thus, it appears that unlimited power of alienation exists in such cases, as stated above, no matter what conditions or limitations are sought to be imposed, and that the common law afforded no remedy for breach or violation of such conditions or limitation except the right of re-entry for condition broken; and that only affected the right of the grantee in the prohibited conveyance. Then, since this unlimited power of alienation is a necessary incident to such estate, and since there is no person who can enforce the attempted limitation on the power to sell when there is no condition, it follows that the words of limitation in the deed above are ineffectual in law, and the deed must be construed as if they had not been written therein.”).

69. *Outlaw* also cited a case from the Kansas Supreme Court—*Somers v. O’Brien*—that found the lack of a right of reentry, among other provisions, rendered restrictive language ineffectual. See *Somers v. O’Brien*, 281 P. 888, 890 (Kan. 1929) (“And so here, the parents granted the premises to Magdalena with many restrictive but ineffective words. In *Wright v. Jenks* it was provided that, if the restrictions were breached, the estate conveyed was to terminate in the grantee and pass over to his collateral kindred. In this case, if the restrictions are breached, what happens? Nothing. There is neither to be a re-entry of the grantors nor an alternative grant or other consequence.”).

70. See *supra* notes 23 and 63 and accompanying text.

71. 188 S.W.2d 564, 566 (Tex. 1945).

It is not clear if the above-quoted dicta would be followed by the Texas Supreme Court today as there are no subsequent cases involving a lessor seeking to terminate an oil and gas lease due to a lessee's failure to obtain consent, and the Second Restatement did not exist at the time of the opinion in 1944 (it was first published in 1983). Nevertheless, a prudent lessee should take the time to identify and carefully analyze any forfeiture provisions based on the mere possibility of termination alone.

#### D. DEFENSES TO VIOLATION OF A VALID RESTRAINT

Waiver, estoppel, and related defenses (such as laches) are additional factors to consider when evaluating the enforceability of a consent-to-assign provision in a Texas oil and gas lease. At least one appellate court in Texas has highlighted that the nature of a consent requirement itself is such that a forfeiture could never truly be "automatic," even if properly worded, and instead would always require a suit or other action by the aggrieved party to perfect a forfeiture.<sup>72</sup> Therefore, given the strong bias in Texas against restraints on alienation and forfeitures, any action taken by a lessor after assignment has occurred that is contrary to the consent right makes the lessor highly vulnerable to waiver and estoppel doctrines.

Section 421 of the First Restatement expressly notes that the issue of waiver in the context of a restraint against alienation is given a "wider meaning" than for contracts generally,<sup>73</sup> and it states that a waiver may thus result if the holder of a consent right accepts any payment from the new owner of the lease or if there is a "long continuing failure to take action after the violation of the restraint becomes known."<sup>74</sup> Ordinarily it would make sense then to always give notice of an assignment to a lessor regardless of whether consent was sought and rebuffed or the lessee decided to move forward without seeking consent in the first place. The failure of a lessor to immediately act after being given notice of a transfer makes them susceptible to waiver.

Section 422 of the First Restatement similarly provides that any conduct which induces reliance on a mere "inference" that the lessee does not intend to exercise its consent right can result in estoppel. That could potentially occur whenever: (i) a lessee obtained some type of generalized advance consent; (ii) the lease was previously assigned without consent but the landowner did not complain; or (iii) the landowner has received notice of an assignment (in any way) and the new owner of the lease begins taking actions—such as commencement of drilling operations—while the landowner sits on its hands and does not immediately

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72. *See Knight v. Chicago Corp.*, 183 S.W.2d 666, 671 (Tex. Civ. App.—San Antonio 1944) ("Under the contract, therefore, the validity of an assignment of an undivided interest rests with the option of the lessors. The clause therefore possesses the characteristics of a condition subsequent rather than those of a limitation. In our opinion an optional restraint upon alienation of the nature here involved can not operate by way of limitation."), *aff'd* 188 S.W.2d 564 (Tex. 1945).

73. RESTATEMENT (FIRST) OF PROP. § 421 cmt. a (1944).

74. *Id.* § 421 cmt. c.

act to enforce the consent right.<sup>75</sup> In fact, in *Knight v. Chicago Corporation* again, the San Antonio Court of Civil Appeals noted as alternative support for its ruling that it could have found a waiver occurred by emphasizing the lessors treated the lease as valid by accepting royalties and “procuring the drilling of an offset well” after they knew of the “attempt to assign.”<sup>76</sup> In the appellate court’s opinion, such conduct meant the lessors waived any right to later insist on forfeiture (if forfeiture had been a valid remedy to begin with). Courts in other jurisdictions have ruled similarly.<sup>77</sup>

As a result, the defenses of waiver, estoppel, and laches—all largely based on simple notice to the lessor that an assignment will or has occurred despite the lack of consent—should be taken into account as part of any mitigation strategy.

#### IV. APPLICATION TO COMMON CONSENT PROVISIONS

##### A. OVERVIEW

Language providing that a fee simple determinable interest—such as that created by an oil and gas lease in Texas—cannot be transferred without the consent of another may constitute any one of the three types of restraints on alienation depending on how the provision is worded and the remedies it provides. The following chart identifies and categorizes the most common language likely to be encountered:

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75. *Id.* § 422 cmt. b.

76. 183 S.W.2d at 672.

77. *See, e.g.,* *Prairie Oil Co. v. Carleton*, 205 P.2d 81, 84 (Cal. App. 4th Dist. 1949) (“The acceptance of rents by the landlord after breach of the conditions of an oil lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of the breach.”); *Scott v. Signal Oil Co.*, 128 P. 694, 695 (Okla. 1912) (“It seems to us that the conduct of the lessor was so inconsistent with a purpose to stand upon her rights under the assignment clause of the lease that there is no room for a reasonable inference to the contrary.”). *But see* *Stanolind Oil & Gas Co. v. Guertzgen*, 100 F.2d 299, 300–02 (9th Cir. 1938) (ruling Montana law favored the forfeiture of oil and gas leases and that acceptance of three small royalty checks for amounts past due after notice of assignment was not a waiver because the new owner of the lease had not changed its position in reliance on lessor’s conduct).

<b>Example Language</b>	<b>Type</b>	<b>Effect</b>	<b>Basis</b>
“This lease shall not be assigned.”	Promissory	Invalid	1st Rest. § 406(b) & cmt. d
“This lease shall not be assigned without lessor consent.”	Promissory	Likely Invalid	3d Rest. § 3.4 cmt. d
“This lease shall not be assigned without lessor consent, such consent not to be unreasonably withheld.”	Promissory	Likely Valid: Damages	1st Rest. § 404 cmt. g; Palmer v. Liles (Tex. App.)
“Any attempt or offer to assign shall . . . .”	—	Invalid	Knight v. Chicago (Tex. App.); Outlaw v. Bowen (Tex. App.)
“Any assignment made without prior written consent of lessor shall be void.”	Disabling	Invalid	1st Res. § 405 & cmt. a; Bouldin v. Miller (Tex. S. Ct.)
“Any assignment made without prior written consent of lessor shall result in a forfeiture of all rights granted hereunder.”	Forfeiture	Invalid	2d Rest. § 4.2(3); Outlaw v. Bowen (Tex. App.)
“This lease shall not be assigned to XYZ Drilling Company without lessor’s written consent. Any assignment made to XYZ Drilling Company without prior written consent of lessor shall result in all rights reverting back to lessor.”	Specific Forfeiture w/ Reversion	Likely Valid: Forfeiture	2d Rest. § 4.2(3); Knight v. Chicago (Tex. S. Ct.)

The first three examples are promissory restraints because they constitute covenants by the lessee not to do a certain thing—i.e., make an assignment at all or make an assignment without first obtaining the consent of the lessor. The fourth example is added to illustrate language that would be deemed invalid due to “uncertainty.” The fifth example is a disabling restraint because it attempts to automatically invalidate an assignment after the transfer has occurred. The sixth and seventh examples seek to cause a forfeiture of rights after an assignment occurs, with the last example being a type of specifically limited forfeiture provision that also contains a reversionary interest.

Under the legal guidance provided by the Restatements and limited Texas case law that exists, only the last type of provision would appear to be particularly dangerous to a lessee (keeping in mind of course that no decision of any court can be entirely predicted). The following section discusses the specific basis for the conclusion as to each type of consent provision listed in the table above.

## B. ANALYSIS OF SPECIFIC CLAUSES

1. *"This lease shall not be assigned."*

A lessee contemplating the transfer of an oil and gas lease containing language that flat-out prohibits all assignment without further qualification should not necessarily be that concerned. Section 406 of the First Restatement would likely render the restraint unenforceable on the grounds that it is not "qualified so as to permit alienation to some though not all possible alienees," and existing case law in Texas would tend to support that result.<sup>78</sup>

If an individual court were nevertheless inclined to enforce such a prohibition—for example, if the defendant were an original lessee who had expressly agreed to the consent language in the context of a commercial transaction—the consequences resulting from violation of the provision would likely be minimal since it would give rise only to a cause of action in damages (and attorneys' fees). Demonstrating that any damages actually resulted from the fact of assignment alone would be difficult, if not impossible, because the mere change in identity of lessee causes no economic harm itself. Further, if the lessor was given notice of an assignment prior to the transfer occurring and chose to wait until actual damages resulted (such as the new lessee causing surface damage or failing to pay royalties), the original lessee would likely be able to escape liability on the grounds that waiver or estoppel had occurred. This is particularly true if the lessor accepted royalties for a period of time after assignment occurred or otherwise allowed the new lessee to incur costs without complaint. In addition, if the defendant is not the original lessee, then evidence that the lessor knew about and allowed previous transfers to occur without consent would further lend support to a finding that waiver or estoppel should apply.<sup>79</sup>

Accordingly, an unqualified prohibition against assignment of an oil and gas lease may well not be a real impediment to transfer of the lease in ordinary circumstances. The public policy in Texas disfavoring restraints on the alienability of fee simple property interests would likely render such a restriction void or effectively inconsequential.

2. *"This lease shall not be assigned without lessor consent."*

The addition of language that satisfies the first element of Section 406 of the First Restatement (i.e., a qualification prohibiting alienation to "some though not all possible alienees"), such as the "without lessor consent" in the heading above, does not significantly alter the analysis, especially when the language only goes so far as to allow assignment if consent is obtained without further imposing a standard of reasonable-

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78. RESTATEMENT (FIRST) OF PROP. § 406(b)–(c) (1944). See also *supra* notes 30–32 and accompanying text.

79. But see *In re Energytec, Inc.*, 739 F.3d 215, 224 (5th Cir. 2013) (ruling consent right related to assignment of natural gas pipeline was a covenant running with the land).

ness on the lessor exercising a consent right. Section 3.4 of the Third Restatement would appear to reject such an unqualified restriction. Comment d of Section 3.4 specifically notes that a consent provision allowing a lessor to act “arbitrarily” in withholding consent is presumptively invalid unless the lessor is obligated to “supply a substitute purchaser for the property.”<sup>80</sup> The consent provision in this example clearly does not include a requirement that the lessor identify a substitute purchaser and, therefore, would likely be invalid.

Regardless, a lessee would ordinarily be well-advised to first seek consent when a lease purports to require consent. For starters, the lessor may accede—which of course obviates all concern—but, even if the request is refused or ignored, the lessee may then proceed forward on the basis that the restriction is presumptively invalid under the Third Restatement and the likelihood that no damages would result from assignment. Further, giving notice that a transfer is about to occur notwithstanding the lack of consent should be done to preserve the possibility of a waiver, estoppel, and/or laches defense.

3. *“This lease shall not be assigned without lessor consent, such consent not to be unreasonably withheld.”*

Language expressly incorporating a standard of reasonableness on the lessor’s exercise of its consent right satisfies the deficiency noted in the previous example, but it does not guarantee enforceability. There remains a substantial likelihood that a court in Texas would not enforce such language in the context of an oil and gas lease. While there are no definitive cases upon which to rely for that conclusion, the factors considered under Section 406 (comment i) of the First Restatement and Section 3.4 of the Third Restatement for evaluating the “reasonableness” of a restraint would likely weigh against enforcing the consent requirement absent a compelling justification because drilling rights are highly marketable and restricting transfer to others who can put the rights to an economically beneficial use is contrary to Texas public policy.

Again, however, prudence dictates that a lessee faced with such language should ordinarily seek consent in the first instance and, if consent is not given, then assess the lessor’s response to determine whether there is significant risk in proceeding notwithstanding a lack of consent. For example, if the lessor fails to respond or fails to give reasons for withholding consent, the lessee may decide to go ahead with the transfer given a reduced risk of substantial damages (so long as the assignee is reasonably reputable and solvent). Further, if the lessor tries to demand a consent fee or some other unbargained-for concession in return for consent, the likelihood that the consent provision would be deemed unenforceable immediately increases because such an attempted extortion is one of the precise “injurious consequences” identified by Section 3.4 of the Third

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80. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. d (2000).



Restatement.<sup>81</sup> Finally, if the landowner were to refuse to give consent without stating a legitimate concern about the proposed transferee, then the *lessee* itself would likely be able to bring claims against the lessor for breach of the covenant not to unreasonably withhold consent.<sup>82</sup> Moreover, in such an inverse scenario, the lessee stands a much better chance of being awarded significant damages due to the comparative ease with which it could prove the loss of consideration the putative transferee was prepared to pay for assignment of the lease.

In reality, therefore, it is only if the lessor refuses to give consent based on objectively verifiable evidence that the proposed assignee is disreputable, inexperienced, or financially incapable of properly carrying out drilling operations (or some other reasonable basis)<sup>83</sup> that a lessee may need to seriously consider not going through with a transfer or paying a consent fee. Making a transfer to a known bad actor in such circumstances increases the likelihood that the lessee could be subject to significant damages for violating a valid promissory restraint.

4. “Any attempt or offer to assign shall be . . . .”

All restraints against alienation are strictly construed. As a result, if there is a way to avoid a restriction against assignment by construing the language so as not to be a restraint, then a Texas court would most likely choose that interpretation. More specific to the example here, under the holding of the San Antonio Court of Civil Appeals in *Knight v. Chicago*

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81. See also 29 WILLISTON ON CONTRACTS § 74:22 (4th ed. 2017) (“Denying consent solely on the basis of personal taste, convenience, or sensibility is not commercially reasonable. It is also unreasonable to deny consent in order that the landlord may charge a higher rent than originally contracted for, since the lessor’s desire for a better bargain than contracted for has nothing to do with the permissible purposes of the restraint on alienation, that is, to protect the lessor’s interest in the preservation of the property and the performance of the lease covenants.”); see also *Pantry, Inc. v. Mosley*, 126 So. 3d 152, 161 (Ala. 2013) (ruling accordingly on the basis of Williston).

82. See, e.g., *Mitchell’s, Inc. v. Nelms*, 454 S.W.2d 809, 813 (Tex. Civ. App.—Dallas 1970, writ ref’d n.r.e.) (considering standard landlord–tenant commercial lease and finding that action for damages may be grounded upon breach of covenant not to unreasonably withhold consent); *Gawenis v. Alta Res., LLC*, 2013 Ark. App. 379, 5–7 (Ark. App. 2013) (affirming that a failure to obtain consent prior to assignment was not a material breach when the lessor refused to consider giving consent to any assignment of an oil and gas lease, which required consent not to be unreasonably withheld, and when the lessor received benefits after assignment).

83. What is considered “reasonable” in withholding consent due to an unacceptable assignee is a fact issue that varies with the circumstances. See, e.g., *Ridgeline, Inc. v. Crow-Gottesman-Shafer No. 1*, 734 S.W.2d 114, 117 (Tex. App.—Austin 1987, no writ) (lessor’s “reasonableness” in withholding consent to proposed lease assignment of shopping center premises raised question of fact, precluding summary judgment). However, in the context of traditional landlord–tenant commercial leases at least, the factors most often considered are: the financial responsibility of the proposed assignee; whether the proposed use of the property would waste the landlord’s interest in the property; the legality of the proposed use; the nature and extent of any alterations needed for the proposed assignee’s use; the proposed assignee’s suitability to use the property; and the expected economic feasibility of the proposed assignee to meet rent obligations. 69 AM. JUR. PROOF OF FACTS 3D, *Circumstances Establishing Landlord’s Unreasonable Withholding of Consent to Assignment or Sublease* §19 (2002); see also 29 WILLISTON ON CONTRACTS § 74:22 (4th ed. 2017) (listing similar factors).

*Corporation*, a “provision restraining the grantee from ‘offering’ or ‘attempting’ to alien[ate] is ordinarily void for uncertainty and cannot be restrained.”<sup>84</sup> As such, a provision based on language seeking to restrain an attempt or offer to assign, as in this example, would likely be invalidated as a matter of law and contractual interpretation.

5. “Any assignment made without prior written consent of lessor shall be void.”

Language in an oil and gas lease that purports to automatically void an assignment made without lessor consent would likely be ruled unenforceable as worded due to the consent element itself placing an “option of enforcement” in the lessor, which the San Antonio Court of Civil Appeals found to be improper in *Knight v. Chicago Corporation*.<sup>85</sup> Further, any provision that purports to invalidate the effectiveness of an assignment without otherwise giving the lessor a right of reentry (i.e., a reversionary interest)<sup>86</sup> would likely be deemed invalid as a disabling restraint.<sup>87</sup> Such a provision could effectively be ignored, while keeping in mind that any remaining elements of the consent-to-assign provision that are not struck as invalid—such as a promissory restraint that the lease not be assigned without consent—may otherwise remain enforceable to the extent discussed in previous examples.

6. “Any assignment made without prior written consent of lessor shall result in a forfeiture of all rights granted hereunder.”

As with the prior example, any consent provision that purports to automatically result in a forfeiture likely would not be valid due to the lack of a right of reentry in the lessor (or someone else). Even if there were additional language appended to the example that did create a reversionary interest—such as by adding “and all such rights shall revert to lessor” at the end of the language in this subheading—the fact that the lessor’s consent right is not limited to some specific category of potential transferees for legitimate purposes would likely render it invalid.<sup>88</sup> A Texas court strictly construing the language and disfavoring a reading that causes a forfeiture would likely determine the provision to be an unreasonable

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84. 183 S.W.2d 666, 671 (Tex. Civ. App.—San Antonio 1944).

85. See *supra* note 72.

86. A right of reentry is defined as a “future interest created in the transferor that could become possessory upon the termination of a fee simple subject to a condition subsequent.” RESTATEMENT (THIRD) OF PROP. WILLS & DONATIVE TRANSFERS § 25.2 cmt. b (2011); see also *El Dorado Land Co., L.P. v. City of McKinney*, 395 S.W.3d 798, 800–03 & nn.3–7 (Tex. 2013) (discussing what constitutes a “right of reentry” and noting that it is simply a type of reversionary interest with a name determined by the type of conveyance). In practice, any language in a consent-to-assign provision that provides the lessor a right to sue for breach and re-obtain ownership of the interest that was conveyed would fall into the category of a “right of reentry” or “reversionary interest.”

87. See *supra* notes 54–55 and accompanying text.

88. See *supra* notes 60–61 and accompanying text.

restraint against all alienation whatsoever, which is a violation of Texas public policy.

Nevertheless, for all the reasons discussed in the previous examples, it would still be advisable for a lessee considering assignment of a lease containing such forfeiture language to first seek the lessor's consent and provide notice so that all possible defenses are preserved. Further, if the forfeiture language contains a proper reversionary interest and the lessor refuses to consent on arguably legitimate grounds, then this would be one of the rare instances in which a lessee should probably not go through with a transfer as it is possible a court would find there is no construction of the language possible other than that which results in forfeiture.<sup>89</sup>

7. *"This lease shall not be assigned to XYZ Drilling Company without lessor's written consent. Any assignment made to XYZ Drilling Company without prior written consent of lessor shall result in all rights reverting back to lessor."*

The language of the example above, unlike all others, is highly likely to be enforceable and result in a forfeiture of the entire lease if violated. The restraint in this instance is limited to one specific entity—XYZ Drilling Company—and expressly gives the lessor a reversionary interest if the condition is broken. Nevertheless, all indications are that a lessor would still have to sue and obtain a judgment terminating the lease in this instance,<sup>90</sup> which may give rise to defenses depending on how the lessor acted (or failed to act) prior to bringing suit.<sup>91</sup> Still, a lessee acts at its own peril in violating such a restriction by risking the loss of all rights it was attempting to transfer, particularly if the defendant is an original lessee who agreed to the restraint up front and then later violates that provision. In any case, given there are typically several potential buyers of drilling rights, lessees generally should not find themselves in a situation where the only option is to transfer a lease to the exact entity whom a lessor bargained to prohibit. Such a provision should not be a realistic impediment.

## V. POTENTIAL ALTERNATIVE FORMS OF ACCOMPLISHING A TRANSFER

Notwithstanding the fact that consent requirements in oil and gas leases are restraints against alienation and greatly disfavored in Texas law, a cautious lessee may take additional comfort in knowing that transfers can still occur by means other than assignment, such as by operation of law in certain types of mergers or acquisitions (or during a bankruptcy proceeding).<sup>92</sup> Again, given a restriction against assignment is "strictly

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89. See *supra* note 71 and accompanying text.

90. See *supra* note 72 and accompanying text.

91. See *supra* notes 76–77 and accompanying text.

92. The Bankruptcy Code provides that a trustee or debtor in possession may assume and assign an "executory contract" or "unexpired lease" even if there is a provision prohib-

construed,”<sup>93</sup> a transfer occurring by means other than an “assignment” should not be viewed as a violation of a consent provision if it does not expressly prohibit the specific form of transfer.<sup>94</sup>

For example, the statutory provisions governing the merger of a Texas entity allow assets like an oil and gas lease to be allocated among the merging entities without an assignment ever occurring. Specifically, Section 10.008(a)(2) of the Texas Business Organizations Code (“TBOC”) provides that “all rights, title, and interests to all real estate and other property” owned by each party to a merger may be allocated to “one or more of the surviving or new organizations as provided in the plan of merger *without*:

- (A) reversion or impairment;
- (B) any further act or deed; or
- (C) any transfer or *assignment* having occurred.”<sup>95</sup>

That provision is broad enough to apply to a wide variety of mergers, including a “dual-survivor” merger in which two companies join together and then instantaneously break apart with the assets and liabilities of the two entities divvied up among themselves as the parties deem fit.

Accordingly, if an entity holding an oil and gas lease with a problematic consent-to-assign provision cannot itself be sold to a purchaser for some reason, then there is still the possibility that a new company could be formed to carry out a dual-survivor merger which reallocates the particularly problematic lease (or leases) by operation of law and without any changes occurring to the pre-existing assets, liabilities, or ownership structures of the two companies. In that way, the parties could effectively accomplish a transfer without having to obtain the consent of a lessor. Currently there is no case law addressing how such a reallocation under TBOC § 10.008 may impact a consent restriction in an oil and gas lease,

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iting assignment. See 11 U.S.C. § 365(f)(1) (2012). Whether a particular contract or instrument qualifies as either, however, is determined by state law, and in Texas, it is well established that an oil and gas lease is a fee simple determinable. As such, it is not a “lease” or “contract” and would generally remain subject to a consent provision even in bankruptcy (to the extent the provision is enforceable). See *River Prod. Co., Inc. v. Webb*, 894 F.2d 727, 739–40 n.17 (5th Cir. 1990); *Terry Oilfield Supply Co., Inc. v. Am. Sec. Bank, N.A.*, 195 B.R. 66, 70, 73 (S.D. Tex. 1996); see also Charles Persons, *Drilling Down: A Deeper Look into the Distressed Oil & Gas Industry Part 3—The Ability to Assume or Reject Oil and Gas Leases*, WEIL BANKRUPTCY BLOG (Feb. 5, 2015), <https://business-finance-restructuring.weil.com/executory-contracts/drilling-down-a-deeper-look-into-the-distressed-oil-gas-industry-part-3-the-ability-to-assume-or-reject-oil-and-gas-leases/> [https://perma.cc/QGD8-WJ6K]. However, given the real property principles discussed herein, ordinary restrictions against assignment would not be much of an impediment. See, e.g., *In re Manalapan Mining Co., Inc.*, No. 13-61501, 2015 WL 3827022, at \*3 (Bankr. E.D. Ky. June 19, 2015) (surveying cases in which Trustee allowed to avoid anti-assignment clause and concluding the requirement that consent not be unreasonably withheld could be met only by allowing Trustee to sell the lease).

93. See *supra* notes 20–23 and accompanying text.

94. See, e.g., *Hudson v. Kim Susan, Inc.*, No. CIV. A. 05-1939, 2007 WL 1063322, at \*5 (E.D. La. Apr. 5, 2007) (analyzing issue to find anti-assignment clause did not prohibit change in control unless specifically stated, and discussing nationwide authority on same).

95. TEX. BUS. ORG. CODE ANN. § 10.008(a)(2)(A)–(C) (West 2016) (emphasis added).

but all the existing case law and legal authority suggests such a transfer offers a viable alternative.

Of course, it should be noted that the result would be different if the consent provision (or other provisions in the lease) expressly states it prohibits not only assignments, but also "mergers," "changes of control," or other types of transfers that may occur by operation of law. In that instance, the rules concerning a restraint against alienation would return back to the forefront.

## VI. CONCLUSION

In sum, due to fact that an oil and gas lease in Texas is a fee simple property interest, provisions that require consent prior to any assignment of the lease do not necessarily create the limitations that contract law alone might otherwise suggest. In many instances, a consent provision will have no appreciable impact on the ability to assign the lease because the language was either poorly drafted or runs afoul of the strong bias in Texas against restraints on the alienation of property interests. That is not to say consent requirements should be ignored. Rather, they should be carefully reviewed in each instance and, as a matter of practice, it would be ideal to always first attempt to comply with all consent-to-assign provisions. A lessee should not, however, necessarily feel constrained to paying an excessive "consent fee" or negotiating with an unreasonable lessor who refuses to give consent for arbitrary reasons. Such acts interfere with the efficient operation of the upstream oil and gas market and would likely face an uphill battle if brought to a Texas court for enforcement.